APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-3450

NICHOLAS KNAPP,

Plaintiff-Appellee,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6454—**James B. Zagel**, *Judge.*

ARGUED NOVEMBER 7, 1996—DECIDED NOVEMBER 22, 1996

Before BAUER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Nicholas Knapp wants to play NCAA basketball for Northwestern University—so badly that he is willing to face an increased risk of death to do so. Knapp is a competent, intelligent adult capable of assessing whether playing intercollegiate basketball is worth the risk to his heart and possible death, and to him the risk is acceptable. Usually, competent, intelligent adults are allowed to make such decisions. This is especially true when, as here, the individual's family approves of the decision and the individual and his parents are

willing to sign liability waivers regarding the worst-case scenario should it occur.

Northwestern, however, refuses to allow Knapp to play on or even practice with its men's basketball team. Knapp, currently a sophomore at Northwestern, has the basketball skills to play at the intercollegiate level, but he has never taken the court for his team. Although Northwestern does not restrict him from playing pick-up basketball games, using recreational facilities on campus, or exerting himself physically on his own, the university disqualified Knapp from playing on its intercollegiate basketball team. The issue in this case boils down to whether the school—because of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794—will be forced to let Knapp don a purple uniform and take the floor as a member of Northwestern's basketball team.

Prior to his senior year of high school Knapp was rated among the best basketball players in Illinois. He was recruited by numerous universities, including Northwestern. At the end of Knapp's junior year at Peoria's Woodruff High School, Northwestern orally offered him an athletic scholarship to play basketball. Knapp orally accepted the offer.

A few weeks into his senior year, Knapp suffered sudden cardiac death—meaning his heart stopped—during a pick-up basketball game. Paramedics used cardiopulmonary resuscitation, defibrillation (i.e., electric shocks), and injections of drugs to bring Knapp back to life. A few weeks later, doctors implanted an internal cardioverter-defibrillator in Knapp's abdomen. The device detects heart arrhythmia and delivers a shock to convert the abnormal heart rhythm back to normal. In other words, if Knapp's heart stops again the device is supposed to restart it.

On the day following his sudden cardiac death, Northwestern informed Knapp and his family that whatever the ultimate medical decision, Northwestern would honor its commitment for a scholarship. Seven weeks after his collapse Knapp signed a national letter of intent to attend Northwestern.

Knapp did not play basketball during his senior year in high school, but he was always a superb student, and in June 1995 he graduated as the valedictorian of his class. In September 1995 he enrolled as a Northwestern student.

On November 7, 1995, Dr. Howard Sweeney, Northwestern's head team physician, declared Knapp ineligible to participate on Northwestern's men's basketball team for the 1995-96 school year.[1] Dr. Sweeney based his decision on Knapp's medical records in which several treating physicians recommended that Knapp not play competitive basketball, the report of team physician Dr. Mark Gardner following a physical examination of Knapp, published guidelines and recommendations following two national medical conferences known as the Bethesda Conferences[2]

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[1] Northwestern's Presidential Directive on Self-Regulation of Intercollegiate Athletics, the Big Ten Conference's Handbook Agreements for Men's Programs, and the NCAA's Constitution and Sports Medicine Handbook all give the team physician sole responsibility to decide whether a student is medically eligible to compete on the basketball team.

[2] Two national medical conferences were held in Bethesda, Maryland, for the specific purpose of establishing prudent consensus recommendations among cardiologists and sports medicine physicians regarding the eligibility of athletes with cardiovascular abnormalities to compete in sports. The first, known as the 16th Bethesda Conference, was held in 1984 and titled "Cardiovascular Abnormalities in the Athlete: Recommendations Regarding Eligibility for Competition." The consensus recommendations from that conference were published in the *Journal of the American College of Cardiology* in December 1985. The second, known as the 26th Bethesda Conference and titled "Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities," was held in January 1994. The consensus recommendations of that conference were published in the *Journal of the American College of Cardiology* in October 1994.

The 26th Bethesda Conference's task force on arrhythmias addressed conditions like Knapp's and implanted cardioverter-defibrillators. This task force recommended that athletes with ventricular fibrillation "that result in cardiac arrest in the presence or absence of structural heart disease cannot participate in any moderate or

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regarding eligibility of athletes with cardiovascular abnormalities, and recommendations of physicians with whom Dr. Gardner and Dr. Sweeney consulted. After the basketball season ended, Northwestern and the Big Ten declared Knapp permanently medically ineligible to play basketball. Northwestern's athletic director, Rick Taylor, later confirmed that Northwestern will never voluntarily let Knapp play intercollegiate basketball as a Wildcat.

As a result, Knapp has never practiced with the Northwestern team nor played in a college game. His scholarship nevertheless continues and he attends practices (though he is not allowed to do anything but watch, apparently). He also receives other benefits afforded to athletes (such as tutoring, counseling, and training table), in addition to the full range of academic and nonacademic offerings the university provides to all students.

On the same day Dr. Sweeney declared him ineligible, Knapp filed a complaint in federal district court asserting that Northwestern's actions violated the Rehabilitation Act. The suit sought declaratory relief, preliminary and permanent injunctive relief, and compensatory damages. Knapp's undisputed goal is to force Northwestern to allow him to play varsity basketball.

In May 1996 Northwestern filed a motion for summary judgment, and Knapp thereafter requested a permanent injunction. The district court held a hearing on September 6, 1996, solely to determine whether Knapp presently is medically eligible to play intercollegiate basketball. Presented with conflicting evidence, the district court found Knapp medically eligible and Northwestern in violation of the Rehabilitation Act. After subsequent hearings on the issue of reasonable accommodation, the district

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high intensity competitive sports." 24 *Journal of the American College of Cardiology* 845, 897 (1994). "For athletes with implantable defibrillators . . . all moderate and high intensity sports are contraindicated." *Id.*

court denied Northwestern's motion for summary judgment and entered a permanent injunction prohibiting Northwestern from excluding Knapp from playing on its basketball team for any reason related to his cardiac condition.

The district court's decision was based on the affidavit of Knapp and the testimony and affidavits of two experts presented by Northwestern and three experts presented by Knapp. All the experts agreed Knapp had suffered sudden cardiac death due to ventricular fibrillation; even with the internal defibrillator, playing intercollegiate basketball places Knapp at a higher risk for suffering another event of sudden cardiac death compared to other male college basketball players; the internal defibrillator has never been tested under the conditions of intercollegiate basketball; and no person currently plays or has ever played college or professional basketball after suffering sudden cardiac death and having a defibrillator implanted. Northwestern's experts, cardiologists who participated in at least one of the Bethesda conferences, testified that playing intercollegiate basketball significantly and unacceptably increases Knapp's risk of death. At least one of Northwestern's experts stated that individuals with internal defibrillators should not play intercollegiate basketball. Knapp's expert cardiologists, one of whom, Dr. Lawrence Rink, is Knapp's treating cardiologist and an Indiana University basketball team physician, testified that although Knapp is at an increased risk for sudden cardiac death, that risk, especially with the internal defibrillator in place, is insubstantial or at least acceptable.

After tasting defeat in the district court, Northwestern filed an emergency notice of appeal on September 27, 1996. It also sought a stay of enforcement of the injunction. We expedited the proceedings, granted the stay pending this decision, and heard oral arguments on November 7, 1996, ironically one year to the day after Dr. Sweeney first declared that Knapp could not play basketball for Northwestern.

We review the district court's grant of a permanent injunction for abuse of discretion. *United States v. Kaun*,

827 F.2d 1144, 1148 (7th Cir. 1987). Factual determinations are reviewed under a clearly erroneous standard and legal conclusions are given *de novo* review. A factual or legal error may be sufficient to establish an abuse of discretion. *Id.* Interpretation of the Rehabilitation Act presents legal questions calling for *de novo* review.

The Rehabilitation Act, which is the sole basis for Knapp's claim, ensures that

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). To prevail on his claim for discrimination under the Act, Knapp must prove that: (1) he is disabled as defined by the Act; (2) he is otherwise qualified for the position sought; (3) he has been excluded from the position solely because of his disability; and (4) the position exists as part of a program or activity receiving federal financial assistance. *Byrne v. Board of Educ., School of West Allis-West Milwaukee*, 979 F.2d 560, 563 (7th Cir. 1992). Northwestern does not dispute that it receives federal financial assistance and that it has excluded Knapp from its intercollegiate basketball program solely because of his cardiac condition, so our focus is on whether Knapp is an "otherwise qualified individual with a disability."

To show that he is disabled under the terms of the Act, Knapp must prove that he

> (i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B). Knapp satisfies the first element of part (i) of this definition. A cardiovascular problem constitutes a physical impairment under § 706(8)(B). 34 C.F.R.

§ 104.3(j)(2)(i)(A); 45 C.F.R. § 84.3(j)(2)(i)(A). Northwestern does not dispute this fact, but it instead zeros in on the second element of the disability definition: whether playing intercollegiate basketball is part of a major life activity and, if so, whether its diagnosis of Knapp's cardiac condition substantially limits Knapp in that activity.

In determining whether a particular individual has a disability as defined in the Rehabilitation Act, the regulations promulgated by the Department of Health and Human Services[3] with the oversight and approval of Congress are of significant assistance. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 279 (1987); *Byrne*, 979 F.2d at 563. Those regulations define "major life activities" as basic functions of life "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii). Regulations regarding equal employment opportunities under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, adopt the same term and definition and an interpretive note provides a bit more guidance: " 'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630, app. § 1630.2.

The regulations promulgated pursuant to the Rehabilitation Act do not define "substantial limitation," and this is not an oversight. In commentary following the regulations, both the Department of Education and the Department of Health and Human Services acknowledge "the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this

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[3] For the most part, the regulations implementing the Rehabilitation Act promulgated by the Department of Health and Human Services are identical to those promulgated by the Department of Education. *Compare* 45 C.F.R. pt. 84 *with* 34 C.F.R. pt. 104. We cite to both.

time." 34 C.F.R. pt. 104, app. A, subpt. A(3); 45 C.F.R. pt. 84, app. A, subpt. A(3). "The court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to [a major life activity].' " *Byrne*, 979 F.2d at 565 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)).

This case is difficult because it does not fit neatly under the Rehabilitation Act. The "disability" Knapp claims is the basis for discrimination against him is not a continuing one like blindness or deafness. At any given moment in time when Knapp's heart is functioning properly his disability does not affect him. He is truly disabled only when his heart stops, which may or may not happen to him again. The disability regarding which Northwestern allegedly discriminates, therefore, actually is the greater risk of harm for Knapp than the risk faced by other male college basketball players. In addition, other impairments usually do not have as severe a result as is possible in this case. A person who is deaf, for instance, will not suddenly die on the basketball court because of that disability. Here, Knapp's disability is all or nothing. Finally, because Knapp's disability affects one of the most central organs of the body, his disability to some extent affects *all* major life activities—if his heart stops, he will not breathe, see, speak, walk, learn, or work. Once again it is all or nothing—either his heart is functioning and no major life activities are limited at that moment, or it has stopped and the most major life activity of all—living—has been affected.

In any event, the parties here have framed their arguments as involving solely the major life activity of learning. Knapp contends that playing an intercollegiate sport is an integral part of his major life activity of learning and that his education will be substantially limited if he cannot play on the team. He states that he does not believe he can obtain confidence, dedication, leadership, perseverance, discipline, and teamwork in any better way. The district court agreed with him, determining that *for Knapp*, playing on the Northwestern basketball team was

part of the major life activity of learning and that he was substantially limited from such learning by the university.

In their arguments, the parties have separated "substantially limited" and "major life activities" into two independent criteria. We do not believe that such a complete separation should be made, at least in regard to learning and working. A comment on this point by the Sixth Circuit is insightful:

> The court in [citation omitted] treated "substantially limiting" and "major life activity" as distinct statutory qualifications. [Citation omitted.] However, at least with respect to the major life activity of "working", they constitute an inseparable whole. An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one.

Jasany v. United States Postal Service, 755 F.2d 1244, 1249 n.3 (6th Cir. 1985). We think this same interrelationship applies regarding learning. If playing NCAA basketball reaches a major life activity, then it is likely that deprivation of that activity would, for the individual basketball player, be a substantial limitation. Likewise, if playing intercollegiate basketball does not reach the status of major life activity, then it is most likely that deprivation will not be a substantial limitation.

We do not think that the definition of "major life activity" can be as particularized as Knapp wants it to be. Playing intercollegiate basketball obviously is not in and of itself a major life activity, as it is not a basic function of life on the same level as walking, breathing, and speaking. Not everyone gets to go to college, let alone play intercollegiate sports. We acknowledge that intercollegiate sports can be an important part of the college learning experience for both athletes and many cheering students—especially at a Big Ten school. Knapp has indicated that such is the case for him. But not every student thinks so. Numerous college students graduate each year having neither participated in nor attended an intercollegiate

sporting event. Their sheepskins are no less valuable because of the lack of intercollegiate sports in their lives. Not playing intercollegiate sports does not mean they have not learned. Playing or enjoying intercollegiate sports therefore cannot be held out as a *necessary* part of learning for *all* students.

A few cases, none of them binding on us, have considered school team sports a major life activity in and of themselves. *See Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995) (intercollegiate football may be a major life activity); *see also Sandison v. Michigan High School Athletic Ass'n, Inc.*, 863 F. Supp. 483, 489 (E.D. Mich. 1994) (participation on the cross-country and track teams an important and integral part of education and a major life activity), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995). In other cases involving school athletics, whether they constituted part of the major life activity of learning is not even discussed. *See Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982) (disability assumed, so major life activity not discussed); *see also Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981) (parties did not dispute that player was disabled).

Because intercollegiate athletics may be *one part* of the major life activity of learning for *certain* students, the parties here have framed the analysis of what constitutes a major life activity into a choice between a subjective test or an objective test—whether we look at what constitutes learning for Nick Knapp or what constitutes learning in general for the average person. The Rehabilitation Act and the regulations promulgated under it give little guidance regarding whether the determination of what constitutes a major life activity turns on an objective or subjective standard.[4] And while we have previously said that

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[4] Knapp argues that because the regulations contain prohibitions against discrimination in postsecondary athletics, including intercollegiate teams, it follows that such athletics constitute a major life activity. That is not the case. Such regulations have no effect

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whether a person is disabled is "an individualized inquiry, best suited to a case-by-case determination," we have also indicated that "the definition of 'major life activity' in the regulations 'cannot be interpreted to include working at the specific job of one's choice,' " *Byrne*, 979 F.2d at 565. Other courts have been across the board on whether the test is objective or subjective. *Compare Pahulu*, 897 F. Supp. at 1393 ("for Pahulu, intercollegiate football may be a major life activity, i.e., learning"), *and Sandison*, 863 F. Supp. at 489 (participation on high school teams is "as to them a major life activity"), *with Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992) (major life activity of working does not necessarily mean working at the job of one's choice).

We decline to define the major life activity of learning in such a way that the Act applies whenever someone wants to play intercollegiate athletics. A "major life activity," as defined in the regulations, is a basic function of life "such as caring for one's self, performing manual

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on the phrase "otherwise qualified with a disability," but rather on the portion of 29 U.S.C. § 794(a) discussing a "program or activity." For instance, 34 C.F.R. § 104.43(a) and 45 C.F.R. § 84.43(a) provide that

> [n]o qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any . . . athletics, . . . other extracurricular, or other postsecondary education program or activity to which this subpart applies[;]

and 34 C.F.R. § 104.47(a) and 45 C.F.R. § 84.47(a) state that

> [i]n providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors *intercollegiate, club, or intramural athletics* shall provide to qualified handicapped students an equal opportunity for participation in these activities.

These regulations apply only after it is determined that the individual is disabled and qualified.

tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii). These are basic functions, not more specific ones such as being an astronaut, working as a firefighter, driving a race car, or learning by playing Big Ten basketball.

However, major life activities are defined in a more individualized manner during the "substantial limitation" analysis, where, according to *Byrne*, 979 F.2d at 565, we look at whether the particular impairment constitutes a significant barrier for the particular person. What impairment will significantly impede learning for a person obtaining her third doctorate is not the same as one which would affect the average tenth grader's ability to learn. But any narrowing of what constitutes learning for a particular individual occurs within reasonable limits—coverage of the Rehabilitation Act is not open-ended or based on every dream or desire that a person may have. Not every impairment that affects an individual's major life activities is a substantially limiting impairment. The key obviously is the extent to which the impairment restricts the major life activity. *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995). For that individual, "[t]he impairment must limit [learning] generally." *Byrne*, 979 F.2d at 565. Just as "[i]t is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap [in regard to working]," the inability to engage in a particular activity for a particular university is not sufficient to establish a disability in regard to education. *Id.*; *see Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994) (no disability because asthmatic condition did not substantially limit breathing or working except while in one room of building), *cert. denied*, 115 S. Ct. 1095 (1995); *Welsh*, 977 F.2d at 1419 (sincere desire to become a firefighter does not mean inability to become one due to sensory deprivation in fingers substantially limits ability to work); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (being declared unsuitable for particular position of police officer not substantial limita-

tion of major life activity). An impairment that interferes with an individual's ability to perform a particular function, but does not significantly decrease that individual's ability to obtain a satisfactory education otherwise, does not *substantially* limit the major life activity of learning. *Welsh*, 977 F.2d at 1418.

Because learning through playing intercollegiate basketball is only one part of the education available to Knapp at Northwestern, even under a subjective standard, Knapp's ability to learn is not substantially limited. Knapp's scholarship continues, allowing him access to all academic and—except for intercollegiate basketball—all nonacademic services and activities available to other Northwestern students, in addition to all other services available to scholarship athletes. Although perhaps not as great a learning experience as actually playing, it is even possible that Knapp may "learn" through the basketball team in a role other than as a player.[5] Knapp is an intelligent student and athlete, and the inability to play intercollegiate basketball at Northwestern[6] forecloses only a small portion of

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[5] Although the present situation appears not to be an ideal learning setting, it is *possible* that in the future Knapp may be allowed more of a role where he will gain knowledge and experience through his participation with the team other than as a player. In the face of Knapp's affidavit, though, we find somewhat disingenuous Northwestern's assertion that Knapp currently is given an opportunity to participate in the basketball program. Knapp indicates that he must attend each practice and game, but he just sits on the bench doing nothing. At practices he is not allowed to do anything but watch. If these facts are true, and Northwestern has not argued that they are not, Knapp is not currently being afforded much of an opportunity for true participation—even nonplaying "participation"—on the team.

[6] Some may wonder why Knapp, if he wants to play basketball so badly, does not just transfer to another school where he is guaranteed the opportunity to play for a team. That thought assumes all colleges and universities are interchangeable, which we decline to believe is true. Outside of basketball, Knapp may very well feel that Northwestern provides for him the best setting

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his collegiate opportunities. Like the firefighter in *Welsh*, who did not show that his education and training limited him to being a firefighter, *Welsh*, 977 F.2d at 1419, Knapp has not shown that his education and training limit him to do nothing but play basketball. The fact that Knapp's goal of playing intercollegiate basketball is frustrated does not substantially limit his education. The Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one. Consequently, we hold that Knapp as a matter of law is not disabled within the meaning of the Rehabilitation Act.

Even if we were inclined to find Knapp disabled under the Rehabilitation Act, he would still come up short because we also hold as a matter of law that he is not, under the statute, "otherwise qualified" to play intercollegiate basketball at Northwestern. A qualified disabled person, with respect to postsecondary education services, is a "person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." 34 C.F.R. § 104.3(k)(3); 45 C.F.R. § 84.3(k)(3). An explanatory note to the regulations states that the term "technical standards" means "all nonacademic admissions criteria that are essential to participation in the program in question." 34 C.F.R. pt. 104, app. A, subpt. A(5); 45 C.F.R. pt. 84, app. A, subpt. A(5).

Section 794 does not compel educational institutions to disregard the disabilities of disabled persons. *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). It requires only that an "otherwise qualified" disabled person not be excluded from participation in a federally

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academically, socially, geographically, and otherwise. Nevertheless, Knapp has offered no evidence that there are no other schools to which he could transfer where he would be allowed to play. Northwestern is not the only place where Knapp may obtain an education, which confirms that denial of the right to play basketball *at Northwestern* is not a denial of his general ability to learn at the college level.

funded program solely because of the disability. *Id.* In other words, although a disability is not a permissible ground for assuming an inability to function in a particular context, the disability is not thrown out when considering if the person is qualified for the position sought. *Id.* at 405-6. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap," *id.* at 406, with reasonable accommodation, *see Arline*, 480 U.S. 287-88 n.17 ("when a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation by the employer would enable the handicapped person to perform those functions").

Legitimate physical qualifications may in fact be essential to participation in particular programs. *Southeastern*, 442 U.S. at 407.

> Paragraph (k) of § 84.3 defines the term "qualified handicapped[7] person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

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[7] The Rehabilitation Act was amended in 1992 to replace the term "handicap" with the word "disability." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4360. The regulations have not caught up.

45 C.F.R. pt. 84, app. A, subpt. A(5); 34 C.F.R. pt. 104, app. A, subpt. A(5). Although blanket exclusions are generally unacceptable, legitimate physical requirements are proper. *See Southeastern*, 442 U.S. at 407; *Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

A significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated. *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991). But more than merely an elevated risk of injury is required before disqualification is appropriate. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985). Any physical qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented, since almost all disabled individuals are at a greater risk of injury. *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619, 622 (9th Cir. 1982).

In *Mantolete*, the Ninth Circuit addressed the standard to apply in determining if an individual is otherwise physically qualified to perform an activity when the possibility of future injury exists:

> [I]n some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.
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> In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently

> assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.

767 F.2d at 1422; *see Chiari*, 920 F.2d at 317 (disabled person not qualified for job if there is genuine substantial risk that worker could be injured or could injure others and employer cannot modify job to eliminate risk). We agree this is the appropriate standard. We now turn, however, to who should make such an assessment.

In this case, the severity of the potential injury is as high as it could be—death. In regard to the probability of injury, Dr. John H. McAnulty, one of Knapp's experts, testified at the injunction hearing that the annual risk of death to Knapp as a result of his cardiac condition under a worst-case scenario is 2.4 percent and that playing intercollegiate basketball would elevate this annual risk to 2.93 percent, or 1 in 34. In other words, if 34 Nick Knapps played basketball for a year, chances are one would die. Dr. Brian Olshansky, another expert for Knapp, put Knapp's risk of death for the 1996-97 basketball season at no greater than 1 in 100. These estimates took into account Knapp's internal defibrillator, apparently the only "accommodation" possible for Knapp's condition. Although the doctors indicated that these numbers were merely estimates, all agreed that the risk to Knapp is higher than to the average male collegiate basketball player. Knapp's experts believed it was an acceptable level of risk.

Northwestern's experts agreed with the school's team doctors that Knapp's participation in competitive Big Ten basketball presented an unacceptable level of risk. According to Dr. Barry J. Maron, one of Northwestern's experts, based on a 10-year study, the risk of nontraumatic death for the average male college basketball player is 1 in 28,818. Dr. Maron further testified that participation in intercollegiate basketball significantly increases Knapp's risk of death, although he believed the precise risk could not be quantified. Dr. Douglas J. Zipes agreed. According to both Drs. Zipes and Maron, the most important fact in assessing Knapp's current risk of sudden cardiac death

while playing intercollegiate basketball is the fact that his previous sudden cardiac death was induced by playing basketball.

Knapp's and Northwestern's experts disagreed on the effect of the passage of time on the likelihood that Knapp would suffer another sudden cardiac death. Almost all experts agreed that the internal defibrillator had never been tested under conditions like an intercollegiate basketball game or practice and that it was unclear whether the device would actual work under the stress and physical conditions of a high-intensity sport. Dr. Olshansky, though, indicated that biweekly "interrogations" of the defibrillator would minimize the risk of its failure. Knapp has had his defibrillator checked on a regular basis and has had no problems with it.

The district court judge in this case believed that in the face of conflicting opinion evidence regarding risk, and the fact that no scientific data existed to quantify that risk, the decision on whether Knapp should play falls in the lap of the court:

> We have nothing more exotic here than highly qualified experts, in agreement on all the basic scientific principles and differing only in their medical judgment on the final question. . . . All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. . . . [M]y task is to consider all the opinions and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts and the random assignment of this case has left it here with me.
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> . . . I again find the opinions of Drs. McAnulty, Rink and Olshansky to be persuasive and I find that

the risk to Nicholas Knapp of a repeat episode is not substantial.

We disagree with the district court's legal determination that such decisions are to be made by the courts and believe instead that medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations. In cases such as ours, where Northwestern has examined both Knapp and his medical records, has considered his medical history and the relation between his prior sudden cardiac death and the possibility of future occurrences, has considered the severity of the potential injury, and has rationally and reasonably reviewed consensus medical opinions or recommendations in the pertinent field—regardless whether conflicting medical opinions exist—the university has the right to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act. The place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is more persuasive.

Other courts have held the same. In *Pahulu*, for instance, an intercollegiate football player presented testimony of three specialists in an attempt to show that his risk of permanent neurological injury was no greater than any other player's and that the University of Kansas declared him physically ineligible based on misconceptions. The Kansas district court nevertheless found that "the conclusion of the KU physicians, although conservative, is reasonable and rational . . . and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment." *Pahulu*, 897 F. Supp. at 1394. We reject those cases intimating that a school's rational decision has no weight. *See Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 954 (D.N.J. 1980) (school board incorrectly "insisted nonetheless in imposing

its own rational decision over the rational decision of the Pooles").

In *Arline*, where a school teacher with tuberculosis was fired and thereafter sued her employer under the Rehabilitation Act, the Supreme Court stated that an "otherwise qualified" inquiry must be individualized and

> should include
>
> > ". . . facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk . . . , (b) the duration of the risk . . . , [and] (c) the severity of the risk . . . ."
>
> In making these findings, the courts normally should defer to the reasonable medical judgments of public health officials.

Arline, 480 U.S. at 287-88. The Court, however, refrained from addressing the deferential weight of the medical judgments of private physicians on which the employer relied. *Id.* Although the Bethesda Conferences were not convened by public health officials and such guidelines should not substitute for individualized assessment of an athlete's particular physical condition, the consensus recommendations of several physicians in a certain field do carry weight and support the Northwestern team doctors' individualized assessment of Knapp.

We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts—neutral arbiters but generally less skilled in medicine than the experts involved—should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence. So long as these factors exist, it will be the rare case regarding participation in athletics where a court may

substitute its judgment for that of the school's team physicians.

In this case, the district court found that if

> as a matter of law and fact, all that is required, as *Pahulu* [cite omitted] holds, is that Northwestern make a rational decision that Knapp's risk is substantial based on reasonable evidence to which courts must defer, then I find Northwestern has done this.

Because we hold today as a matter of law that a court must allow Northwestern to make its own determinations of substantial risk and severity of injury if they are based on reliable evidence, the district court's order forcing Northwestern to let Knapp play must be reversed.

We note further that the district court did not distinguish between the reasonableness of Northwestern's decision to exclude Knapp back in the 1995-96 season and the reasonableness of its decision to bar him from playing this year and the next two. Knapp contends that no proper finding of reasonableness appears in the record because the district court stated that the issue to be addressed was Knapp's condition this fall rather than the rectitude or irrectitude of Northwestern's actions. Dr. Sweeney's and Dr. Gardner's bases for deeming Knapp ineligible in 1995-96 do appear in the record, however, and both testified regarding the present season that, based upon their prior information and the newer testimony of Drs. Rink, Olshansky, McAnulty, Maron, and Zipes, they still believed Knapp remains at a substantial risk of death by playing intercollegiate basketball.

In closing, we wish to make clear that we are *not* saying Northwestern's decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act. On the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recommendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team. Simply put, all universities need not evaluate risk the

same way. What we say in this case is that if substantial evidence supports the decision-maker—here Northwestern—that decision must be respected.

Section 794 prohibits authorities from deciding without significant medical support that certain activities are too risky for a disabled person. Decisions of this sort cannot rest on paternalistic concerns. Knapp, who is an adult, is not in need of paternalistic decisions regarding his health, and his parents—more entitled to be paternalistic toward him than Northwestern—approve of his decision. *See Wright* at 794 (Columbia's decision not to allow student with sight in only one eye to play football "contrary to the express wishes of his parents who, together with their son, have reached a rational decision concerning the risk involved"). In regard to cases involving risk of future injury, a school's perception of the threat of such injury cannot be based on unfounded fears or stereotypes; it must be based on objective evidence. *Chiari*, 920 F.2d at 317. But here, where Northwestern acted rationally and reasonably rather than paternalistically, no Rehabilitation Act violation has occurred. The Rehabilitation Act "is carefully structured to replace . . . reflexive actions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ." *Arline*, 480 U.S. at 284-85.

For these reasons, the district court's grant of the permanent injunction and denial of Northwestern's motion for summary judgment are reversed and the case is remanded with instructions to enter summary judgment in favor of Northwestern.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: November 22, 1996

BEFORE: Honorable William J. Bauer, Circuit Judge
Honorable Diane P. Wood, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

No. 96-3450

NICHOLAS KNAPP,

Plaintiff - Appellee

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR,

Defendants - Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 95 C 6454, James B. Zagel, Judge

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1997

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

NICHOLAS KNAPP,

Plaintiff-Appellee,

No. 96-3450 v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6454—**James B. Zagel**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 6, 1996, by the plaintiff-appellee, no judge in active service has requested a vote

thereon,[1] and all of the judges on the original panel have voted to deny a rehearing.

Accordingly, IT IS ORDERED that the petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

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[1] The Honorable Joel M. Flaum, Circuit Judge, and the Honorable Ilana Diamond Rovner, Circuit Judge, did not participate in the consideration of this petition for rehearing.

APPENDIX C

938 F.Supp. 508

Nicholas KNAPP, Plaintiff,
v.
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and Rick Taylor, Defendants.

No. 95 C 6454.

United States District Court,
N.D. Illinois,
Eastern Division.

Sept. 13, 1996.

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

On September 19, 1994, Knapp's heart stopped and he collapsed following a pick-up basketball game in his high school gym. Knapp was revived by paramedics using cardiopulmonary resuscitation and electronic defibrillation. Knapp was then hospitalized and diagnosed as having suffered sudden cardiac death caused by primary ventricular fibrillation. Knapp claims he suffered a ventricular fibrillation following an episode of syncope. On October 3, 1994, Knapp had an automatic cardioverter defibrillator implanted in his abdomen to attempt to restart his heart in the event of another cardiac arrest. The defibrillator's purpose is to recognize certain heart arrhythmias and provide programmed therapy to restore any such heart arrhythmias to normal.

On November 9, 1994, Knapp signed a National Letter of Intent to attend Northwestern on an athletic scholarship to play basketball. Northwestern was aware of Knapp's heart condition at the time of the signing. When Knapp began Northwestern in the fall of 1995, Dr. Howard Sweeney, the head physician for Northwestern's Basketball team, concluded that Knapp was not medically eligible to participate in intercollegiate basketball based upon Knapp's medical records, published medical guidelines, and recommendations of other physicians he consulted. Knapp continues to be a member of the team and continues to receive his scholarship, but he is not able to practice or compete with the team. Knapp wishes to play basketball for Northwestern and sues under the Rehabilitation Act.

At a hearing in this Court on September 6, 1996, four cardiologists testified as to Knapp's condition and his risk of future injury. They were evenly split on their conclusions as to whether he might play, but they were largely in agreement on the substance of the medical science applicable to Nicholas Knapp and his heart.

Rehabilitation Act

Section 504(a) of the Rehabilitation Act of 1973 protects "otherwise qualified individuals" from discrimination on account of disability. The purpose of the Act is to provide an "even handed treatment of qualified handicapped persons" and to prevent discrimination based on a perceived "inability to function in a particular context." In order to make out a prima facie case of discrimination under the Rehabilitation Act, Knapp must demonstrate that (1) he is a "disabled" individual within the meaning

of the Act, (2) he is "otherwise qualified" for the position sought, (3) he is excluded from the position solely because of the disability, and (4) the position from which he is excluded is part of a federally funded program.

In deciding a case under the Rehabilitation Act the rational basis test is not applicable. The statute by its very terms does not provide that a recipient of federal financial assistance may discriminate against an individual on the basis of a handicap, even if there is a rational basis for so discriminating. The inquiry is whether the University has, in fact, discriminated on the basis of handicap.

Northwestern admits that it receives federal financial assistance and that it has disqualified Knapp from playing solely because of his cardiovascular impairment. Thus, the only remaining issues are whether Knapp is "disabled" within the meaning of the statute and whether he is "otherwise qualified" to play intercollegiate basketball.

(1) The Rehabilitation Act defines a "disabled" individual as a person who has a physical impairment that substantially limits ***510** one or more of his major life activities. Whether a person is "disabled" within the meaning of the Act is a highly fact-sensitive question. There is no question that Northwestern regards Knapp as having a permanent cardiovascular impairment constituting a physical impairment under the Act. However, Northwestern argues that intercollegiate basketball is not a "substantial life activity" and that Knapp has not been "substantially limited" in participating in the sport.

(a) The district courts, and these are the only courts that have addressed the issues, are split over whether participation in sports is a "major life activity." See Pahulu v. University of Kansas, 897 F.Supp. 1387 (D.Kan.1995). The federal regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." What constitutes a major life activity must be determined on an individual basis, so a plaintiff need only prove that a particular function is a major life activity as to him.

Intercollegiate sports play a major role in a student's education and learning process. This has been recognized by several courts that have found physical education and participation in athletic activities on college campuses to be an important part of the educational process. The regulations promulgated pursuant to the Rehabilitation Act support this viewpoint by prohibiting universities from discriminating against qualified disabled athletes who are to have an equal opportunity for participation in intercollegiate athletics. The regulations specifically state that "[i]n providing . . . athletics . . . to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers . . . intercollegiate . . . athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities." 34 C.F.R. § 104.47.

While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp. It is clear that competitive basketball has played a substantial role in Knapp's education and learning process as he has learned valuable life skills and charac-

ter traits. As Knapp stated in his affidavit, "[m]y participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting." Because competitive basketball is an important and integral part of Knapp's education and learning experience, I find that intercollegiate basketball is a major life activity for him.

(b) Northwestern argues that exclusion from participation in a single extracurricular activity is not a substantial limitation because he can engage in other activities that would provide him with the same educational benefits such as playing an instrument in the school band or orchestra. I do not disagree that participation in the band or orchestra may give a student who has trained for years on a particular instrument an educational experience similar to that of intercollegiate athletics. However, the law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra

instead and receive the same educational experience. It also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field perhaps (particularly so when that field is chosen without knowing of the disability). Furthermore, there are relatively few, if any, activities that demand the same level of teamwork, ***511** precision and discipline as an intercollegiate sport to which a person can transfer particular skills.[1] For this reason, it would probably not be enough for Northwestern to say that Knapp would be permitted to play baseball or golf.[2]

Northwestern also argues that because Knapp continues to receive his scholarship, still has a role with the team, and is given access to all the benefits given other team members except the ability to play, he is not "substantially limited." Northwestern misses the mark. It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer. The fact that Northwestern

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[1] I might be willing to find that an athlete who plays both intercollegiate football and baseball is not substantially limited if he is disqualified from only football, but that is not the case here.

[2] The Bethesda Conference classified Basketball as having moderate static and high dynamic demands. Baseball as having low static and moderate dynamic demands and golf as having low static and low dynamic demands.

will not allow Knapp to play constitutes a substantial limitation on his ability to play intercollegiate basketball.

(2) Knapp must next prove that he is "otherwise qualified" to play intercollegiate basketball at Northwestern. In other words, Knapp must be able to meet all of the program's requirements in spite of his handicap. The parties agree that an individual is not qualified if there is a genuine substantial risk that he or she could be injured or could injure others. When making this determination, whether the risk of injury is substantial, a court must be careful not to undermine the policy of the Rehabilitation Act by letting remote concerns legitimize discrimination. "Any qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at a greater risk [of injury]." Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 622 (9th Cir.1982). Thus, this case turns on whether the risk of injury, death, to Knapp of playing intercollegiate basketball is substantial.

I find the risk of injury to Knapp is not substantial based on the testimony of the four cardiologists who testified at the hearing. Dr. McAnulty testified that the risk of death for individuals that have experienced ventricular fibrillation and sudden death goes down after the first year. Doctors Zipes and Maron testified that the risk is not time dependent, but they conceded that most recurrences happen within the first year. It is now nearly two years to the day that Knapp's heart went into ventricular fibrillation. Knapp has not had a repeat episode or displayed any symptoms. In addition, Knapp's latest echo-cardiogram showed no problems as compared

to his previous echo-cardiograms. This is all in light of the fact that Knapp has continued to play basketball on a competitive level for more than the past year in addition to lifting weights, jogging and sprinting. Had this hearing been conducted more than a year ago, I would have found at that time that the risk of injury to Knapp was substantial. However, the passage of time, as testified to by the cardiologists, is a factor. Knapp has been asymptomatic for two years. The cardiologists agree that the chance Knapp will experience a second event while playing intercollegiate basketball in the first place is low and two of them whom I credit agree that this risk has decreased with the passage of more than one year. In addition, the cardiologists agree that the chance the implantable cardioverter defibrillator will not work to restore a normal heart beat in the event Knapp does experience a second event is slight. While some people might find that a 1 in 1,000 or even a 1 in 1,000,000 chance of dying is too much, the Rehabilitation Act requires that remote or minimal risks not be used to legitimize discrimination. While the determinations of risk were admittedly made without a reasonable degree of medical certainty, since very little data exists regarding ventricular fibrillation and implantable cardioverter defibrillator and none *512 exists regarding intercollegiate athletes in such situations, I find the risk to Knapp is not substantial after the passage of two years without any symptoms. In making this decision, I did not consider the testimony of Dr. Rink who testified to his reevaluation of the cause of Knapp's sudden death in September 1994.

I therefore find that Northwestern's reasons for excluding Nicholas Knapp from playing intercollegiate

basketball violate the Rehabilitation Act.[3] This decision does not state an opinion on whether Northwestern can require Knapp or potential survivors to sign a waiver of liability. It may well have a right to insist on waiver, a right arising from other sources of law. Ordinarily, a plaintiff neither increases nor decreases rights under the Rehabilitation Act by signing or refusing a waiver although waivers may be relevant to reasonableness of accommodation. Nor does it decide whether Northwestern may require a current showing on Knapp's fitness to play on grounds other than the suitability of his cardiac condition. I have only concluded that Northwestern's basis for determining Knapp ineligible to play thus far is insufficient.

(3) To complete the analysis I must evaluate the balance of harms and public interest. The harm to Northwestern if Knapp is able to play basketball is substantial but quite contingent. It is the extremely slight risk that Knapp may harm another player if he receives a shock from his implantable defibrillator and the harm that Northwestern would suffer as an institution if a student wearing a Northwestern jersey were to collapse and die on the basketball court. The harm could include not only the general harm to its university reputation but also is its ability to recruit good student athletes. The harm to Knapp if he is unable to play is substantial and certain.

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[3] Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. Life has risks. Thus purpose of § 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them." Poole v. South Plainfield Bd. of Ed., 490 F.Supp. 948, 953-54 (D.N.J.1980).

Playing intercollegiate basketball is a major life activity for him and his inability to play would curtail his ability to live his life fully and end his chances, however speculative, of a professional basketball career. Knapp does not consider the risk of death to himself to constitute a harm as he is willing to assume that risk. I therefore find that the balance of harms weighs in favor of Nicholas Knapp as the injury to him would be irreparable. I find there are arguments for the public interest of equal weight on both sides. The public interest does not preclude issuance of the injunction. Finally, Northwestern must provide Knapp with a reasonable accommodation when he plays. This means here there must be a defibrillator at courtside and a trained person who can operate it at all times when Knapp is practicing and competing in games.

Conclusion

The injunction is granted.

APPENDIX D

[Dated September 25, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS KNAPP, Plaintiff,	)	No. 95 C 6454
v.	)	Judge James B. Zagel
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR, Defendants.	)	

MEMORANDUM OPINION AND ORDER

In seeking to have me reconsider my prior opinion, Northwestern University has presented additional testimony from Dr. Zipes, Dr. McAnulty, Dr. Olshansky and Dr. Gardner. In the course of listening to the testimony, it has become clear that little of the science is in dispute. Dr. Zipes, a distinguished and candid expert, rejects the views of Drs. McAnulty, Olshansky, and Rink, who testified at the first hearing, on the fundamental ground that there is no data to support their conclusions that Nicholas Knapp is at little risk of dying on the basketball court. It is undisputed that there is no data because no one has ever studied, nor has there ever been, an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted

and continued to play competitive basketball at a Division I level. It is also quite clear that such data is likely never to exist as there are relatively few who can play basketball at a Division I level and, at most, a mere handful who have experienced events like Nicholas Knapp. It is also difficult to imagine ever having enough cases to study against a non-playing control group. And even if there were, Dr. Zipes and the physicians at the Bethesda Conference would insist that persons like Knapp do not play, so there never will be data on which to rely in deciding the level of risk. This may not be unusual. I suspect that some medical risks remain forever unknown because it would be unethical to perform the studies which would tell what the risk might be.

Dr. Zipes contends in this case that there is a risk, he does not know how great it is, and no one else can *know now* how great that risk may be. At bottom, I do not think that any expert in this case is in serious disagreement with these contentions. Even the Drs. Olshansky and McAnulty who tried reluctantly to quantify the risk (their reward was that the University made good use of their efforts against them). In fact the risk is clearly unquantifiable. Regrettably unanimous agreement on this gets us nowhere because to decide here, Congress has required a judicial decision on the substantiality of the risk.

Where the law requires a decision as to the probable truth of something when the scientific truth of it is unknowable, the decision must generally (but not always) be made even if it is made without what passes for scientific probability. In such cases, we ordinarily erect presumptions. Dr. Zipes may be doing this. One could take his position to be that since the gravity of the risk can-

not be scientifically known, we must presume the risk to be substantial and hence medically unacceptable. In other words, in the absence of evidence of safety, we must presume danger. Stated this way, the opinions of Dr. Zipes are legal or moral in nature, not scientific. In science what is unproved is unproved. A scientist can not ordinarily make a scientific judgment that, in the absence of proof that the answer is probably yes, then the answer is probably no. The answer is simply, we do not know.

Having said this I do not think that this really is Dr. Zipes' position. Instead, his view is that, based on his well honed medical judgment there are substantial risks in all cases like that of Nicholas Knapp and also in Knapp's case in particular. In addition, the contrary opinion of other physicians must be disregarded because they lack scientific proof and because their medical judgment is wrong.

Another theme of Dr. Zipes' testimony is that it is unnecessary to quantify the risks to Knapp playing basketball, as Drs. McAnulty and Olshansky have done, since any risk above and beyond the risk to Knapp for engaging in ordinary daily life functions is unacceptable. This premise that increased risks exist for Knapp playing basketball is scientifically undisputed here. While this recommendation that an individual should not engage in any "unessential" activity that increases one's risk under these circumstances, no matter how great or small, is clearly rational in the medical profession, it cannot mandate a decision under the law as Congress wrote it.

We have nothing more exotic here than highly qualified experts, in agreement on all the basic scientific

principles and differing only in their medical judgment on the final question. The difference of opinion between medical experts in this case is not unusual. Years ago, physicians who testified in court often said that medicine was an art and not a science. This is much less true today than it was in the 1960s when I first heard it. *See Mercado v. Ahmed*, 756 F. Supp. 1097, 1101 n.7 (N.D. Ill. 1991). Yet there is still truth in the old saw and it applies to questions like those here where physicians have decades of personal professional experience with heart problems of the sort in this case and not a single scientific study squarely on point to back up their judgments. The judgments may differ but are not worthless or inadmissible for this reason. A high degree of inter-expert reliability is not a sine qua non of admissible medical opinion, in the courtroom or in the hospital. Indeed the very utterance that medicine was more art than science was the physician witness' way of explaining to courts how it was that doctors could so strongly disagree. All the physicians who testified used commonly accepted scientific principles and proven data about the heart and its functioning. All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. I find that there is nothing in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), or Federal Rule of Evidence 702, that precludes me from considering the views of all the physicians in this case. As such, I cannot summarily disregard the opinions of Drs. McAnulty, Olshansky and Rink, nor, for that matter, the opinions of Drs. Zipes, Maron and Gard-

ner as my task is to consider all the opinions and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts and the random assignment of this case has left it here with me.

We are thus back to where we started. After reconsidering the testimony of the expert witnesses, I again find the opinions of Drs. McAnulty, Rink and Olshansky to be persuasive and I find that the risk to Nicholas Knapp of a repeat episode is not substantial.

We now turn to the issue of reasonable accommodation. I did not focus on this issue in the first opinion. Neither party fully addressed it and in the absence of forceful advocacy I decided that having an external defibrillator at courtside was a reasonable accommodation. Dr. Zipes now testifies that an external defibrillator may actually do great harm in the presence of an internal defibrillator when used outside the environs of a medical office or hospital. Dr. Zipes also noted that, in any event, the degree to which Knapp's risk would be reduced by the presence of an external defibrillator is unknown. I find this testimony persuasive, but all that it implies is that an external defibrillator cannot be required as a reasonable accommodation. Indeed, I think Dr. Olshansky and, to a lesser extent, Dr. McAnulty offered a courtside defibrillator option more as a comfort factor to the Court and perhaps to the University. After considering the credible testimony of the doctors Olshansky and McAnulty, I am persuaded that the reasonable accommodation is the one that has already been made, that is the implantable defibrillator. Thus, the external defibrillator is

not required and thus the issue of its cost and reasonableness is moot.

The issue of accommodation now shifts to how often the internal defibrillator should be interrogated. Dr. Zipes testified that it should be interrogated after every game, while Dr. Olshansky testified out of an abundance of caution that it should be interrogated every two weeks. I accept Dr. Olshansky's opinion here because of Knapp's recent experience of months of physical activity including playing basketball. Thus, the only reasonable accommodation is for Knapp to have his internal defibrillator interrogated bi-weekly. Since the cost of interrogation has been assumed by Knapp, at least for purposes of injunctive relief, I need not consider the reasonableness of cost to Northwestern at this time.

I do find, as a matter of law and fact, that if all the law requires, as *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995) holds, is that Northwestern make a rational decision based on reasonable evidence that Knapp's risk is substantial to which courts must defer, I find Northwestern has done this.

Plaintiff's counsel is ordered to prepare a draft order of injunction for inspection by defense counsel.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: September 25, 1996

APPENDIX E

[Dated September 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS KNAPP, Plaintiff,	)	No. 95 C 6454
v.	)	Judge James B. Zagel
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR, Defendants.	)	

ORDER AND JUDGMENT GRANTING PERMANENT INJUNCTION

This matter having come before the court for trial on plaintiff Nicholas Knapp's prayer for permanent injunction pursuant to the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.) to:

1. Enjoin and restrain defendants (including any of their officers, agents, employees or attorneys) from excluding plaintiff from participating as an active and eligible member of Northwestern University's men's intercollegiate basketball team ("Northwestern's basketball team") on any basis related to the suitability of plaintiff's cardiac condition or any condition related thereto; and

2. Require defendants to provide to plaintiff immediately all benefits, rights and privileges given to other active and eligible members of Northwestern's men's basketball team.

The issues having been tried, with certain evidence submitted by the parties, and the written arguments of counsel considered, and the Court having issued a Memorandum Opinion and Order dated September 9, 1996 and September 25, 1996 (collectively "Memorandum Opinion"), which are attached hereto as Exhibit A and Exhibit B, respectively, and are incorporated by reference, the Court hereby finds and concludes as follows:

1. The Court has jurisdiction of this cause under the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq.

2. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby incorporates by reference the factual findings and conclusions of law which are set forth in its Memorandum Opinion as the factual findings and conclusions of law in this Judgment Order.

3. Based upon the findings of fact and conclusions of law set forth in the Memorandum Opinion, the Court concludes that plaintiff is entitled to a permanent injunction in this cause.

IT IS ORDERED that judgment be and is hereby entered against defendants Northwestern University and Rick Taylor (who are hereinafter collectively referred to as "Northwestern") and in favor of plaintiff with respect to plaintiff's prayer for permanent injunctive relief on Count I of the First Amended Complaint. Northwestern and Taylor (including their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this

Order) are hereby permanently enjoined and restrained as follows:

1. Northwestern is enjoined and restrained from excluding plaintiff from participating as an active and eligible member of Northwestern's basketball team on any basis related to the suitability of his cardiac condition or any condition related thereto, except as stated in Paragraph 3 below, and is further enjoined and restrained from failing to provide to plaintiff immediately all the benefits, rights and privileges given to other students who are eligible members of Northwestern's basketball team;

2. Northwestern is directed to immediately inform the Big Ten Conference of the court's ruling that plaintiff is to be made an active and eligible member of Northwestern's basketball team and, further, to file with the Big Ten Conference the appropriate documentation to make plaintiff a "counter" for tender of financial aid. Plaintiff's right to participate and compete in all practices and contests of Northwestern's basketball team shall not be adversely affected by either the Big Ten's or the National Collegiate Athletic Association's classification of plaintiff as either a "counter" or a "medical non-counter" as those terms may be defined by either the Big Ten or the NCAA (or any other status relating to the suitability of plaintiff's cardiac condition or any condition related thereto.)

3. The Court shall retain jurisdiction to enforce the terms of this Judgment order, including the modification of its terms based upon a subsequent change

in plaintiff's cardiac condition or any condition related thereto.

4. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that while there remain other claims which have not yet been fully adjudicated, there is no just reason to delay the entry of this Judgment Order and expressly directs that his Judgment Order be entered.

5. The Court reserves jurisdiction with respect to the enforcement of this Judgment Order, and all other pending claims not fully adjudicated.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: September 26, 1996

APPENDIX F

942 F.Supp. 1191

Nicholas KNAPP, Plaintiff,
v.
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and Rick Taylor, Defendants.

No. 95 C 6454.

United States District Court,
N.D. Illinois,
Eastern Division.

Oct. 7, 1996.

CONSOLIDATED MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

Nicholas Knapp has moved for an injunction that would allow him to play basketball for Northwestern University. Northwestern in turn has moved for summary judgment on Knapp's claim under the Rehabilitation Act. I have already ruled on the merits of these claims in this case in two separate rulings. This is a consolidation of those opinions.

On September 19, 1994, Nicholas Knapp's heart stopped and he collapsed following a pick-up basketball game in his high school gym. Knapp was revived by paramedics using cardiopulmonary resuscitation and electronic defibrillation. Knapp was then hospitalized

and diagnosed as having suffered sudden cardiac death caused by primary ventricular fibrillation. Knapp claims he suffered a ventricular fibrillation following an episode of syncope. On October 3, 1994, Knapp had an automatic cardioverter defibrillator implanted in his abdomen to attempt to restart his heart in the event of another cardiac arrest. The defibrillator's purpose is to recognize certain heart arrhythmias ***1194** and provide programmed therapy to restore any such heart arrhythmias to normal.

On November 9, 1994, Knapp signed a National Letter of Intent to attend Northwestern on an athletic scholarship to play basketball. Northwestern was aware of Knapp's heart condition at the time of the signing. When Knapp began Northwestern in the fall of 1995, Dr. Howard Sweeney, the head physician for Northwestern's basketball team, concluded that Knapp was not medically eligible to participate in intercollegiate basketball based upon Knapp's medical records, published medical guidelines, and recommendations of other physicians he consulted. Knapp continues to be a member of the team and continues to receive his scholarship, but he is not able to practice or compete with the team. Knapp wishes to play basketball for Northwestern and sues under the Rehabilitation Act.

Two hearings were held in this courtroom in which a number of cardiologists testified regarding Knapp's present condition, his risk of future injury and the type of reasonable accommodation necessary. The cardiologists were evenly split on their conclusions as to whether he should play, but they were largely in agreement on the substance of the medical science applicable to Nicholas Knapp and his heart.

Discussion

A party seeking a permanent injunction must establish that (1) he has succeeded on the merits, (2) no adequate remedy at law exists, (3) irreparable harm will arise absent injunctive relief, (4) the balance of harms favors entry of an injunction, and (5) the entry of the injunction will not harm the public interest. Smith Barney, Harris Upham & Co., Inc. v. St. Pierre, 1994 WL 11600, *3 (N.D.Ill.1994).

Rehabilitation Act

Section 504(a) of the Rehabilitation Act of 1973 protects "otherwise qualified individual[s]" from discrimination on account of disability. 29 U.S.C. § 794(a). The purpose of the Act is to provide even-handed treatment of qualified disabled persons and to prevent discrimination based on a perceived inability to function in a particular context. In order to make out a prima facie case of discrimination under the Rehabilitation Act, Knapp must demonstrate that (1) he is a "disabled" individual, (2) he is "otherwise qualified" for the program sought, (3) he is excluded from the program solely because of the disability, and (4) the program from which he is excluded is part of a federally funded program. Byrne v. Board of Educ., School of West Allis-West Milwaukee, 979 F.2d 560, 563 (7th Cir.1992).

In deciding a case under the Rehabilitation Act the rational basis test is not applicable. Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1383-84 (10th Cir.1981). The statute by its very terms does not provide that a recipient of federal financial assistance may discriminate against an individual on the basis of a

handicap, even if there is a rational basis for so discriminating. Id. at 1384. The inquiry is whether the University has, in fact, discriminated on the basis of handicap. Id.

Northwestern admits that it receives federal financial assistance and that it has disqualified Knapp from playing solely because of his cardiovascular impairment. Thus, the only remaining issues are whether Knapp is "disabled" within the meaning of the statute and whether he is "otherwise qualified" to play intercollegiate basketball.

(1) The Rehabilitation Act defines a "disabled" individual as a person who has a physical impairment that substantially limits one or more of his major life activities. 29 U.S.C. § 706(8)(B). Whether a person is "disabled" within the meaning of the Act should be determined on a case by case basis. Byrne, 979 F.2d at 565. There is no question that Northwestern regards Knapp as having a permanent cardiovascular impairment constituting a physical impairment under the Act. However, Northwestern argues that intercollegiate basketball is not a "substantial life activity" and that Knapp has not been "substantially limited" in participating in the sport.

***1195** (a) The district courts, and these are the only courts that have addressed the issue, are split over whether participation in sports is a "major life activity." See Pahulu v. University of Kansas, 897 F.Supp. 1387, 1390-93 (D.Kan.1995); Doe v. Dolton Elementary School Dist. No. 148, 694 F.Supp. 440, 445 (N.D.Ill.1988); cf Scharff v. Frank, 791 F.Supp. 182, 184 (S.D.Ohio 1991). The federal regulations define "major life activities" as "functions such as caring for one's self, performing man-

ual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii). What constitutes a major life activity must be determined on an individual basis, so a plaintiff need only prove that a particular function is a major life activity as to him. Pahulu, 897 F.Supp. at 1392.

Intercollegiate sports play a major role in a student's education and learning process. This has been recognized by several courts that have found physical education and participation in athletic activities on college campuses to be an important part of the educational process. See, e.g., Pahulu, 897 F.Supp. at 1391-92. The regulations promulgated pursuant to the Rehabilitation Act support this viewpoint by prohibiting universities from discriminating against qualified disabled athletes who are to have an equal opportunity for participation in intercollegiate athletics. The regulations specifically state that "[i]n providing . . . athletics . . . to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers . . . intercollegiate . . . athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities." 34 C.F.R. § 104.47(a)(1).

While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp. It is clear that competitive basketball has played a substantial role in Knapp's education and learning process as he has learned valuable life skills and character traits. As Knapp stated in his affidavit, "[m]y participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular

activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting." Because competitive basketball is an important and integral part of Knapp's education and learning experience, I find that intercollegiate basketball is a major life activity for him.

(b) Northwestern argues that exclusion from participation in a single extracurricular activity is not a substantial limitation because he can engage in other activities that would provide him with the same educational benefits such as playing an instrument in the school band or orchestra. I do not disagree that participation in the band or orchestra may give a student who has trained for years on a particular instrument an educational experience similar to that of intercollegiate athletics. However, the law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra instead and receive the same educational experience. It also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field particularly so when that field is chosen without

knowing of the disability. Furthermore, there are relatively few, if any, activities that demand the same level of teamwork, precision and discipline as an intercollegiate sport to which a person can transfer particular skills.[1] For this reason, it would probably *1196 not be enough for Northwestern to say that Knapp would be permitted to play baseball or golf.[2]

Northwestern also argues that because Knapp continues to receive his scholarship, still has a role with the team, and is given access to all the benefits given other team members except the ability to play, he is not "substantially limited." Northwestern misses the mark. It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer. The fact that Northwestern will not allow Knapp to play constitutes a substantial limitation on his ability to play intercollegiate basketball.

(2) Knapp must next prove that he is "otherwise qualified" to play intercollegiate basketball at Northwest-

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[1] I might be willing to find that an athlete who plays both intercollegiate football and baseball is not substantially limited if he is disqualified from only football, but that is not the case here.

[2] The Bethesda Conference classified Basketball as having moderate static and high dynamic demands. Baseball as having low static and moderate dynamic demands and golf as having low static and low dynamic demands.

ern. In other words, Knapp must be able to meet all of the program's requirements in spite of his handicap. The parties agree that an individual is not qualified if there is a genuine substantial risk that he or she could be injured or could injure others. When making this determination, whether the risk of injury is substantial, a court must be careful not to undermine the policy of the Rehabilitation Act by letting remote concerns legitimize discrimination. "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at a greater risk [of injury]." Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 622 (9th Cir.1982). A mere elevation of risk, without more, is insufficient to find that Knapp is not "otherwise qualified." Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir.1985). Thus, this case turns on whether the risk of injury (death) to Knapp of playing intercollegiate basketball is substantial. This determination turns on two issues, whether Knapp has a substantial risk of having a recurrent event of ventricular fibrillation while playing basketball and in the event Knapp does have a second episode, whether the implantable cardioverter defibrillator will work.

First, I find the risk to Knapp of a repeat episode is not substantial based on the testimony of the cardiologists who testified at the hearing. In the course of listening to the testimony, it has become clear that little of the science is in dispute. Drs. McAnulty and Olshansky attempted to quantify the risk of death for individuals that have experienced ventricular fibrillation and sudden death. They stated that the risk of death goes down after the first year. Drs. Zipes and Maron did not

significantly disagree. They testified that the risk is not time dependent, but they conceded that most recurrences happen within the first year. Despite this testimony, Dr. Zipes made it clear that there is no data to support the conclusions of Drs. McAnulty and Olshansky. And there is no dispute on this matter because no one has ever studied, nor has there ever been, an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted and continued to play competitive basketball at a Division I level. It is thus clear that the risk to Knapp of experiencing a second event is unquantifiable. Regrettably, unanimous agreement on this gets us nowhere because to decide this case, Congress has required a judicial decision on the substantiality of the risk.

Where the law requires a decision as to the probable truth of something when the scientific truth of it is unknowable, the decision must generally (but not always) be made even if it is made without what passes for scientific probability. In such cases, we ordinarily erect presumptions. We could take the position that because some risk exists, although its gravity cannot be scientifically ***1197** known, we must presume the risk to be substantial. In other words, in the absence of evidence of safety, we must presume danger. But such a presumption assumes that an individual should not engage in any "unessential" activity that increases one's risk under the circumstances, no matter how great or small. While this opinion, which I attribute to Dr. Zipes' testimony, is clearly rational in the medical profession, it cannot mandate a decision under the law as Congress wrote it.

In this case, there are highly qualified experts in agreement on all the basic scientific principles and dif-

fering only in their medical judgment on the final question. The difference of opinion between medical experts in this case is not unusual. Years ago physicians who testified in court often said that medicine was an art and not a science. This is much less true today than it was in the 1960s when I first heard it. See Mercado v. Ahmed, 756 F.Supp. 1097, 1101 n. 7 (N.D.Ill.1991). Yet there is still truth in the old saw and it applies to questions like those here where physicians have decades of personal professional experience with heart problems of the sort in this case and not a single scientific study squarely on point to back up their judgments. The judgments may differ but are not worthless or inadmissible for this reason. All the physicians who testified used commonly accepted scientific principles and proven data about the heart and its functioning. All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. I find that there is nothing in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), or Federal Rule of Evidence 702, that precludes me from considering the views of all the physicians in this case. As such, I must consider the testimony of all the experts who testified and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts, and the random assignment of this case has left it here with me.

Weighing the testimony of all the experts, the most persuasive factors in reaching my decision are Knapp's lack of symptoms over the past two years and the evidence that the risk of a repeat episode appears to decrease with time, though this is not scientifically proved. It is now nearly two years to the day that Knapp's heart went into ventricular fibrillation. Knapp has not had a repeat episode or displayed any symptoms. In addition, Knapp's latest echo-cardiogram showed no indicia of concern as compared to his previous echo-cardiograms. All this is in light of the fact that Knapp has continued to play basketball on a competitive level for more than the past year in addition to lifting weights, jogging and sprinting. Had this hearing been conducted more than a year ago, I would have found at that time that the risk of injury to Knapp was substantial. The passage of another year matters here. Knapp has been asymptomatic for two years. The cardiologists agree, despite the lack of data, that the chance Knapp will experience a second event while playing intercollegiate basketball in the first place is either low or unknown and two of them, whom I credit, agree that this risk has decreased with the passage of more than one year.

Second, I find the risk that the implantable cardioverter defibrillator will not work to restore a normal heart beat in the event that Knapp does experience another episode is slight. On this the cardiologists seem to agree. While some people might find that a 1 in 1,000 or even a 1 in 1,000,000 chance of dying is too much, the Rehabilitation Act requires that remote or minimal risks not be used to legitimize discrimination. "Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive

sports activity. Life has risks. The purpose of s 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them." Poole v. South Plainfield Bd. of Ed., 490 F.Supp. 948, 953-54 (D.N.J.1980). I conclude that Northwestern's reasons for excluding ***1198** Nicholas Knapp from playing intercollegiate basketball violate the Rehabilitation Act.

Turning to the issue of reasonable accommodation, the parties debate the efficacy of having an external defibrillator at Knapp's side during practice, games and for a period of time afterwards and the frequency in which the internal cardiac defibrillator ought to be interrogated to insure it is working properly. Northwestern appears to argue, by use of Dr. Zipes' testimony, that there is no accommodation that would be reasonable. Dr. Zipes testified that an external defibrillator may actually do great harm in the presence of an internal defibrillator when used outside the environs of a medical office or hospital. Dr. Zipes noted that, in any event, the degree to which Knapp's risk would be reduced by the presence of an external defibrillator is unknown. On behalf of Nicholas Knapp, Drs. McAnulty and Olshansky testified that having an external defibrillator at courtside during games would reduce the risk of death to Knapp by some small margin. However, considering the testimony of all present regarding the high reliability of the internal defibrillator and the opinions that there is a small increased benefit, or an unknown benefit or a detriment of using an external defibrillator, it appears to me that Knapp has offered the courtside defibrillator option more as a comfort factor to the Court and perhaps to the University than as an accommodation he believes to be neces-

sary. Considering the credible testimony of all the experts, I am persuaded that the reasonable accommodation is the one that has already been made, that is the implantable defibrillator. I find that an external defibrillator cannot be required as a reasonable accommodation and thus the issue of its cost and reasonableness is moot.

The question of accommodation then shifts to how often the internal defibrillator should be interrogated. Dr. Zipes testified that it should be interrogated after every game, while Dr. Olshansky testified, out of an abundance of caution, that it should be interrogated every two weeks. I accept Dr. Olshansky's opinion here because of Knapp's recent experience of months of physical activity including playing basketball. Thus, the only reasonable accommodation is for Knapp to have his internal defibrillator interrogated bi-weekly. Since the cost of interrogation has been assumed by Knapp, at least for purposes of injunctive relief, I need not now consider the reasonableness of cost to Northwestern.

In closing I note that if, as a matter of law and fact, all that is required, as Pahulu v. University of Kansas, 897 F.Supp. 1387, 1394 (D.Kan.1995) holds, is that Northwestern make a rational decision that Knapp's risk is substantial based on reasonable evidence to which courts must defer, then I find Northwestern has done this.

This decision does not state an opinion on whether Northwestern can require Knapp or potential survivors to sign a waiver of liability. It may well have a right to insist on waiver, a right arising from other sources of law. Ordinarily, a plaintiff neither increases nor decreases rights under the Rehabilitation Act by signing or refusing a waiver although waivers may be relevant to

reasonableness of accommodation. Nor does this opinion decide whether Northwestern may require a current showing on Knapp's fitness to play on grounds other than the suitability of his cardiac condition. I have only concluded that Northwestern's basis for determining Knapp ineligible to play thus far is insufficient and in violation of the Rehabilitation Act.

Having found that Knapp has succeeded on the merits, I turn to the remaining elements of the injunction analysis. It is clear that there is no adequate remedy at law for Knapp in this case. Damages for his injury cannot restore what he has lost, the inability to play with his team and compete. The only remedy for his injury is to insure that Northwestern does not continue to exclude him from playing on the Men's Division I Basketball Team. It is also clear that Knapp will suffer irreparable harm if injunctive relief is not granted since he will lose his chance of ever playing Division I basketball.

Next, I balance the harms. If Knapp is able to play basketball the harm to *1199 Northwestern would be substantial, but quite contingent. It is the extremely slight risk that Knapp may harm another player if he receives a shock from his implantable defibrillator and the harm that Northwestern would suffer as an institution if a student wearing a Northwestern jersey were to collapse and die on the basketball court. The harm could include not only the general harm to its university reputation but also to its ability to recruit good student athletes. The harm to Knapp if he is unable to play is substantial and certain. Playing intercollegiate basketball is a major life activity for him and his inability to play would curtail his ability to live his life fully and end his chances, however speculative, of a professional

basketball career. Knapp does not consider the risk of death to himself to constitute a harm as he is willing to assume that risk. I therefore find that the balance of harms weighs in favor of Nicholas Knapp.

Finally, I find there are arguments for the public interest of equal weight on both sides. Thus, the public interest does not preclude issuance of the injunction.

Conclusion

The permanent injunction is granted. The motion for summary judgment is also denied.